



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 46 OF 2020

BETWEEN

V.CHOKAA t/a

V.CHOKAA & CO. ADVOCATES.....APPLICANT

AND

LOCAL AUTHORITIES

PROVIDENT FUND (LAPFUND).....RESPONDENT

(Being an application for stay of execution from the Ruling of the High Court of Kenya at Kisii (Ougo, J.), dated 11th March, 2020

in

Misc. Civil Application No. 36 of 2017)

RULING OF THE COURT

[1] The applicant, V. Chokaa, t/a V. Chokaa & Co. Advocates was the advocate for Local Authorities Provident Fund (LAPFUND). Arising from that relationship, the advocate filed an advocate/client bill of costs for Kshs. 54,901,834 and a certificate of taxation dated 25th January, 2019 was issued, certifying the costs as due. The applicant thereafter obtained judgment against LAPFUND for Kshs. 54,804,907.

[2] LAPFUND moved the High Court seeking to have the judgment entered against it on 18th December, 2019 set aside together with all consequential orders, or alternatively the certificate of taxation dated 25th January, 2019 set aside, and the bill of costs dated 27th June, 2017 referred for taxation afresh. Upon hearing the application, the High Court (**Ougo J**) set aside the judgment that had been entered against LAPFUND together with the certificate of taxation and all consequential orders. The court also directed that the bill of costs dated 27th June, 2017 be referred for taxation afresh.

[3] The applicant who had already commenced execution proceedings in regard to the judgment against LAPFUND by initiating garnishee proceedings against Kenya Commercial Bank Ltd as the garnishee holding money for LAPFUND, is aggrieved by the orders of the High Court setting aside the judgment in his favour against LAPFUND. The applicant has filed a notice of appeal and applied for certified copies of proceedings and ruling.

[4] In the meantime, the applicant has moved this Court by way of a notice of motion under Rule 5(2)(b) of the Court of Appeal Rules, and Section 3A and 3B of the Appellate Jurisdiction Act seeking to stay execution of the orders that were issued by the High Court at Kisii (**Ougo, J**) on 11th March, 2020.

[5] The applicant's motion is supported by the grounds stated on the body of the motion and an affidavit sworn by Vincent Chokaa, an Advocate practicing in the applicant's firm. The applicant avers that should LAPFUND proceed to execute the Orders issued by the High Court, the money held under the garnishee proceedings which were not the subject of the application to set aside judgment, will be withdrawn, and the applicant will not be able to recover the amount.

[6] LAPFUND objects to the applicant's motion through a replying affidavit sworn by its Legal Manager Kellen Njue, stating *inter alia*, that the amount held by the garnishee has already been released to LAPFUND; that the learned Judge in the Kisii High Court ruled that the court

had no jurisdiction to hear the matter and therefore transferred the matter to the Employment and Labour Relations Court (ELRC) at Kisumu; and that the applicant cannot seek costs in a matter where the court had no jurisdiction. LAPFUND therefore contends that there is no basis for the order of stay that is sought by the applicant, as the applicant has failed to demonstrate any substantial loss that he is bound to suffer. In addition, the applicant has not provided any security under Order 42(6)(2) of the Civil Procedure Rules.

[7] For an applicant seeking orders under Rule 5(2)(b) of this Court's Rules to be successful, the applicant must demonstrate first, that the intended appeal upon which the application is anchored, is arguable, and secondly, that should the Court fail to grant the orders sought, the appeal will be rendered nugatory, meaning that if the application is declined and the appeal subsequently succeeds, it would have been a futile exercise. This was reiterated by the Court in **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd., Civil Application No. Nai 157 of 2006:**

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

[8] On whether the intended appeal is arguable, the applicant has exhibited a draft memorandum of appeal in which he has raised five grounds of appeal. The grounds raise several issues such as whether the learned Judge: made a determination on an application that was improperly before the court; erred in determining a reference that was improperly filed; erred in interfering with the taxation of the Bill of costs without demonstrating the error made by the taxing master; and whether the learned Judge determined the applicant's bill of costs and garnishee proceedings without giving the applicant an opportunity to be heard. All these are arguable issues and therefore the applicant has satisfied the first principle of arguability.

[9] On the second aspect of whether the appeal will be rendered nugatory should the orders sought not be granted, from the averments, it is not in dispute that the respondent was the applicant's client. It is also not in dispute that the applicant's bill of costs was taxed at Kshs. 54,901,834/-. As there was no reference filed against this taxation, the applicant filed execution proceedings to enforce judgment for this amount, and upon obtaining judgment the applicant commenced garnishee proceedings to recover this amount.

[10] Given that the applicant is disputing the orders made by the High Court in which the garnishee proceedings were set aside, unless an order of stay of execution is issued there is a risk that the funds being held by the garnishee may be withdrawn and this in effect, may render the applicant's appeal nugatory as he may be unable to execute the judgment.

[11] We are therefore satisfied that the applicant has satisfied the requirements of **Rule 5(2)(b)** of the Court Rules. Accordingly, we allow his application and grant the orders as prayed. Costs shall be in the appeal

Dated and delivered at Nairobi this 4th day of December, 2020

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR